Berjaya Industrial Bhd & Anor v Public Bank (L) Ltd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D3-22-108-1995
ABDUL MALEK J
13 MAY 1995

Conflict of Laws *— Foreign proceedings — Restraint of foreign proceedings — Application for injunction — Which is the natural forum*

Civil Procedure *— Injunction — Restraint of foreign proceedings — Jurisdiction of Malaysian court to restrain foreign proceedings — Whether foreign proceedings vexatious and oppressive — Discretion of trial judge*

The first defendant filed a suit against the plaintiffs and the fourth defendant in the UK ('the UK suit') for breach of contract on 24 January 1995. For the same transactions, the plaintiffs also instituted an action against the four defendants in Malaysia on 2 March 1995 ('the KL suit'). On 2 May 1995, two months after the filing of the writ in the KL suit, the plaintiffs applied for injunctions restraining the first defendant from further proceeding with their action in the UK suit and from taking any legal proceedings against them in any jurisdiction other than in Malaysia. The plaintiffs contended that all the transactions in dispute were based on similar considerations and that the relevant meetings had been held in the second plaintiff's office in Kuala Lumpur and that the executives of the second and third defendants had travelled from Singapore and Hong Kong respectively to Kuala Lumpur for the meetings. Letters, faxes and telephone calls had also been sent and made to Kuala Lumpur. They also stated that the first defendant is licensed under the Offshore Banking Act 1990 and is located in Malaysia. The first plaintiff is a Malaysian company listed on the Kuala Lumpur Stock Exchange. The second plaintiff, although incorporated in the Cayman Islands, has its correspondent office in Kuala Lumpur. All the directors of the second plaintiff are Malaysians living and working in Malaysia and all pre-contractual negotiations had taken place in Kuala Lumpur.

Held, allowing the plaintiffs' application:

(1) There had been no inordinate delay on the part of the plaintiff in filing this application, as the plaintiffs were at the same time rather involved in attending to the UK suit (see p 394B–C); *Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198 distinguished.

(2) The forum should be where the substance of the tort was received and acted upon. Separate claims in contract and in tort in different jurisdictions should not be segregated. The court has jurisdiction to restrain a party from proceeding in a foreign court if foreign proceedings would be vexatious and oppressive. It is also not necessary for the foreign court to first say that they have

jurisdiction before an application to restrain such foreign proceedings can be considered (see p 395D–E); *Diamond v Bank of London and Montreal Ltd* [1979] 2 WLR 228 followed.

(3) The first defendant had not stated the purpose nor furnished the reason as to why they had filed the matter in the United Kingdom in the first place. Hence, taking into account the witnesses' convenience and time, travel and hotel expenses, and legal costs of the case if the matter was heard in the United Kingdom and not in Malaysia, considering that the dispute involves the same transactions and an identical set of facts and witnesses, there cannot be two sets of judicial proceedings in different jurisdictions on the same subject matter between the same parties as this would give rise to multiplicity of proceedings and possible conflicting judgments. It would be vexatious and oppressive to proceed in the United Kingdom courts if all the factors are considered in its totality. The natural and appropriate forum is the Malaysian courts (see p 404A–C).

[Bahasa Malaysia summary

Defendan pertama telah memfailkan suatu tindakan terhadap plaintif dan defendan keempat di United Kingdom ('tindakan UK') untuk pelanggaran kontrak pada 24 Januari 1995. Untuk transaksi yang sama, plaintif juga telah memulakan tindakan terhadap keempat-empat defendan di Malaysia pada 2 Mac 1995 ('tindakan KL'). Pada 2 Mei 1995, dua bulan selepas pemfailan writ dalam tindakan KL, plaintif telah memohon untuk injunksi untuk menahan defendan pertama daripada bertindak selanjutnya dengan tindakan mereka dalam tindakan UK dan daripada mengambil sebarang prosiding undang-undang terhadap mereka dalam bidang kuasa yang lain selain daripada di Malaysia. Plaintif telah menghujahkan bahawa semua transaksi yang dipertikaikan adalah berdasarkan pertimbangan yang sama dan bahawa mesyuarat-mesyuarat yang relevan telah diadakan di pejabat plaintif kedua di Kuala Lumpur dan eksekutif-eksekutif defendan-defendan kedua dan ketiga masing-masing telah membuat perjalanan dari Singapura dan Hong Kong ke Kuala Lumpur untuk menghadiri mesyuarat-mesyuarat tersebut. Surat, faks dan panggilan telefon juga telah dihantar dan dibuat ke Kuala Lumpur. Mereka juga telah menyatakan bahawa defendan pertama telah dilesenkan di bawah Akta Bank Luar Pesisir 1990 dan ditempatkan di Malaysia. Plaintif pertama merupakan sebuah syarikat Malaysia yang disenaraikan di Bursa Saham Kuala Lumpur. Plaintif kedua, walaupun diperbadankan di Kepulauan Cayman, mempunyai pejabat persuratan di Kuala Lumpur. Kesemua pengarah plaintif kedua adalah warganegara Malaysia yang menetap dan bekerja di Malaysia dan kesemua perundingan sebelum kontrak telah dibuat di Kuala Lumpur.

Diputuskan, membenarkan permohonan plaintif:

(1) Tidak ada sebarang kelambatan yang keterlaluan pada pihak plaintif dalam membuat permohonan ini, memandangkan bahawa mereka pada masa yang sama sedang terlibat dalam menguruskan tindakan UK (lihat ms 394B–C); *Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198 dibeza.

(2) Forum sepatutnya berada di mana unsur tort telah diterima dan dilakukan. Tuntutan yang berasingan dalam kontrak dan tort dalam bidang kuasa yang berlainan tidak patut diasingkan. Mahkamah mempunyai bidang kuasa untuk menyekat sesuatu pihak daripada memulakan prosiding dalam mahkamah luar negeri jika prosiding luar negeri akan bersifat menyusahkan dan menindas. Juga adalah tidak perlu untuk mahkamah asing terlebih dahulu mengatakan bahawa ianya mempunyai bidang kuasa sebelum satu permohonan untuk menyekat prosiding luar negeri sedemikian dapat dipertimbangkan (lihat ms 394D–E); *Diamond v Bank of London and Montreal Ltd* [1979] 2 WLR 228 diikut.

(3) Defendan pertama tidak menyatakan tujuan ataupun memberikan sebab-sebab mengapa mereka tidak memfailkan perkara ini di United Kingdom. Maka, mengambil kira kesesuaian dan masa saksi-saksi, tambang perjalanan dan perbelanjaan hotel, dan kos peguam kes ini jikalau perkara ini didengar di United Kingdom dan bukannya di Malaysia, memandangkan bahawa pertikaian ini melibatkan transaksi yang sama dan fakta-fakta dan saksi-saksi yang sama, tidak boleh terdapat dua set prosiding kehakiman di bidang kuasa yang berlainan atas perkara yang sama di antara pihak-pihak yang sama, kerana ini akan menimbulkan kepelbagaian prosiding dan kemungkinan penghakiman yang bercanggahan. Adalah menyusahkan dan menindaskan untuk bertindak di mahkamah United Kingdom jikalau kesemua faktor telah dipertimbangkan secara keseluruhan. Forum yang wajar dan biasa adalah mahkamah Malaysia (lihat ms 404A–C).]

Notes

For cases on restraint foreign proceedings and forum conveniens, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 646–647 and 707–718.

Cases referred to

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160

Chatenay v The Brazilian Submarine Telegraph Co Ltd [1891] 1 QB 79

Coral Isis, The [1986] 1 Lloyd's Rep 413

Diamond v Bank of London and Montreal Ltd [1979] 2 WLR 228

El Du Pont De Nemours & Co & Anor v IC Agnew & Ors [1987] 2 Lloyd's Rep 585

ELF Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd [1986] 1 MLJ 177

Fehmarn, The [1957] 2 All ER 707, [1958] 1 All ER 333

Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor [1986] 2 MLJ 198
Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong [1995] 1 MLJ 322
Kai Tai Timber Co Ltd, Hong Kong v Inter Maritime Management Sdn Bhd [1994] 4 CLJ 844
Mackender v Feldia AG [1967] 2 QB 590
MacShannon v Rockware Glass Ltd [1978] 2 WLR 362
Manitoba & North-west Land Corp v Allan [1898] 3 Ch 432
Lakhmiram Kevalram Bhatt v Poonamchand Pitamber AIR 1921 Bom 128
SNI Aerospatiale v Lee Kui Jak & Anor [1987] 3 All ER 510, [1987] 2 MLJ 397
VR Naik v Balvant Sitaram Mahindre AIR 1927 Bom 135

VK Lingam (*W Satchithanandhan* and *V Sivaparanjothi* with him) (*VK Lingam & Co*) for the plaintiffs.

Kumar Kanagasingam (*David Peter* with him) (*Allen & Gledhill*) for the first defendant.

Jeyanthini Kannaperan (*Shearn Delamore & Co*) on watching brief for the second, third and fourth defendants.

Abdul Malek J: The crux of the problem lies in the fact that as on the date of the hearing of this matter, there appears to be two sets of judicial proceedings in different jurisdictions involving the same parties in different capacities on the same subject matter. The obvious effect of this multiplicity of proceedings is that it would give rise to the possibility of two conflicting judgments apart from the other problems of convenience, time and expenses incurred for witnesses and counsel.

The first defendant had filed their suit ('the UK suit') in the United Kingdom, in London to be exact, for damages for breach of contract against the plaintiffs and the fourth defendant on 24 January 1995. The plaintiffs, as the defendants there, had been served at the end of January 1995 and they had applied to set aside the service on them. They had not, as argued later, applied for a stay of the proceedings.

For the same transactions, the plaintiffs had instituted this action ('the KL action') against the four defendants on 2 March 1995. The first defendant had entered an unconditional appearance on 10 March 1995 and had filed their statement of defence on 27 March 1995. The second and third defendants had filed a conditional appearance on 3 April 1995.

It cannot therefore be disputed that, at this point of time, the first defendant had submitted themselves to the Malaysian jurisdiction for the KL action whereas the plaintiffs are still challenging the jurisdiction of the United Kingdom courts by applying to set aside the service on them in the UK suit.

In *VR Naik v Balvant Sitaram Mahindre* AIR 1927 Bom 135, the defendant, who was a resident of the state of Hyderabad, had filed a suit against the plaintiff in that state. Subsequently, the plaintiff had filed

A another suit against the defendant in the Bombay High Court. The subject matter in the two suits was the same. The defendant had entered an appearance in the plaintiff's suit without protest and had also made a counterclaim. It was decided that the Bombay High Court would have jurisdiction in the plaintiff's suit to pass an order restraining the defendant from proceeding with his suit in the Hyderabad courts. However, the court B did make an observation that the jurisdiction to stay suits is one of a delicate character and the discretion has to be exercised with caution.

In *Manitoba & North-West Land Corp v Allan* [1898] 3 Ch 432, it was held that where a person appears unconditionally or without protest, he is taken to have submitted to the jurisdiction. In the case of *Lakhmiram* C *Kevalram Bhatt v Poonamchand Pitamber* AIR 1921 Bom 128, it was ruled that a court has jurisdiction to restrain a party within the jurisdiction, from prosecuting a suit in a foreign court if it thinks that the action of the party in filing the suit in the foreign court, is opposed to the notions of equity of the court seeking to restrain him; and that it cannot actually prevent the D party from continuing his action in the foreign court, but if he came within the jurisdiction of the court, proceedings might be taken against him for contempt.

This particular application, which had been filed by the plaintiffs by way of summons in chambers on 2 May 1995, was for the following orders:

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(1) an injunction restraining the first defendant abovenamed from further proceeding or continuing with their action vide 1995 Folio No 124 filed in the High Court of Justice, Queen's Bench Division, Commercial Court in England ('the UK suit') against the plaintiffs and the fourth defendant abovenamed, either themselves or by any F other persons on their behalf;

(2) an injunction restraining the first defendant abovenamed from taking any court/legal proceedings against the plaintiffs and the second, third and fourth defendants abovenamed, in any jurisdiction other than in the courts of Malaysia, in connection with or arising out of G any of its claims against the plaintiffs, in connection with the interest rates swap transactions referred to in the Malaysian proceedings vide High Court of Malaya at Kuala Lumpur (Commercial Division) Suit No D3–22–108–1995 ('the KL action');

(3) an order that if the first defendant abovenamed or their officers, H servants or agents or representatives disobey the orders of this honourable court under paras (1) and (2) above, they be committed to imprisonment for contempt of this honourable court;

(4) that costs of this application be in the cause of this action; and

(5) such further or consequential orders as this honourable court deems I fit or necessary to grant.

It is first necessary to consider whether there had been delay on the part of the plaintiffs in making this application as it had been filed about two months after the filing of the writ, conscious of the fact that an injunction

should not be made available to a parties who sleep on their rights. I have been made aware of *Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198, but I must emphasize that the facts there are distinguishable. In that case, the appellant had been suspended in his absence and the suspension was only for six months. When the matter was heard, three months had already lapsed and his status quo would have, in any event, been restored at the end of the next three months.

Learned counsel for the first defendant had also reiterated before me that this application was premature as not all parties are properly before the court yet, and hearing this matter after the application by the plaintiffs to set aside the service on them in the UK suit fixed on 16 May 1995, would not in any way prejudice the plaintiffs. In these circumstances, considering the period of two months, I was more inclined to hold that there had been no inordinate delay in the filing of this application, quite mindful of the fact that the plaintiffs were at the same time rather involved in attending to the UK suit.

Despite that, it is pertinent to point out that the chain of events had put pressure on the court timewise, as it had to fix the hearing of this matter within the two-week period between the filing of the application and the scheduled date in London of the plaintiffs' application in the UK suit to set aside the service on them. This court was of the considered opinion that to hear it after the London application could lead to other possible complications.

Concerning the point of who in fact filed first, to my mind, this is totally irrelevant for this purpose as it is purely a matter of an accident of timing as stated in *EI Du Pont De Nemours & Co & Anor v IC Agnew & Ors* [1987] 2 Lloyd's Rep 585 and *The Coral Isis* [1986] 1 Lloyd's Rep 413.

As for the factors in favour of the plaintiffs, it has been averred and submitted that all three transactions are based on similar considerations and the relevant meetings had been held in the second plaintiff's office in Kuala Lumpur, and the executives of the second and the third defendants had travelled from Singapore and Hong Kong respectively to Kuala Lumpur for the meetings. The letters, faxes and telephone calls had also been sent and made to Kuala Lumpur.

The first defendant, which is licensed under the Malaysian Offshore Banking Act 1990, is located in Malaysia and is wholly owned by Public Bank Bhd which has its headquarters in Kuala Lumpur. The first plaintiff is a Malaysian company listed on the Kuala Lumpur Stock Exchange. The second plaintiff is incorporated in the Cayman Islands. However it is unable to carry on business there, and it has its correspondent office in Kuala Lumpur. All the directors of the second plaintiff are Malaysians living and working here and all pre-contractual negotiations had taken place in Kuala Lumpur and not in London or anywhere else in the United Kingdom.

Being respectively from Singapore and Hong Kong, the second and third defendants are closer to Malaysia than to the United Kingdom and all witnesses for the first defendant and the plaintiffs live and work in

Malaysia, except probably for one, namely Tan Koay Lye, who resides in Australia. As the second and third defendants were agents of the fourth defendant, it is unlikely that the fourth defendant would have any witnesses to call or if they do have any, it may be only one or two compared to the number of witnesses for the plaintiffs and the other defendants who are from Malaysia, Singapore and Hong Kong.

To my mind, it does not really matter that the plaintiffs' claim here is for a negative declaration whereas the first defendant's suit in the United Kingdom is for a substantive claim in damages for breach of contract. As for the third transaction and the parties agreeing to be bound by the ISDA master agreement and the schedule which states that the governing jurisdiction is the United Kingdom courts, it must be emphasized that the ISDA master agreement and the schedule had actually never been signed. It cannot therefore be argued that the parties must resort to the United Kingdom courts.

The first defendant knew that the first plaintiff was unwilling to give their corporate guarantee and were only willing to give letters of awareness, but the sample confirmations of the swap intermediation agreement between the three parties, namely the plaintiffs, the first defendant and the fourth defendant, were never executed; there was no reference to the date and only one director of the second plaintiff had signed, and not all directors as required.

It is clear from case authorities that the forum should be where the substance of the tort was received and acted upon; see *Diamond v Bank of London and Montreal Ltd* [1979] 2 WLR 228. This court is also of the view that the separate claims in contract and in tort in different jurisdictions should not be segregated. The fact that the second, third and fourth defendants are not yet proper parties in this suit is also quite irrelevant.

It must be observed that all representations, warranties and inducements had come from the second and third defendants and although there was no documentation, the first defendant had admitted receiving the relevant intermediation fees from the transactions. This court also holds that it is not necessary for the foreign court to first say that they have jurisdiction before this sort of application can be considered.

In *Chatenay v The Brazilian Submarine Telegraph Co Ltd* [1891] 1 QB 79, the plaintiff, a Brazilian subject, had executed in Brazil in the Portuguese language, a power of attorney to a broker resident in London to buy and sell shares. Accordingly, the broker had sold certain shares of the plaintiff in the defendant and they were registered in the names of the purchasers. Subsequently, the plaintiff had claimed a rectification of the register on the ground that the sale was not authorized by the power of attorney. On the trial of a preliminary issue to determine whether the construction of the power of attorney was to be governed by Brazilian or English law, the Court of Appeal in England, per Lord Esher MR stated at p 84:

> ... if according to such evidence the intention appears to be that the authority shall be acted upon in foreign countries, it follows that the extent of the authority in any country on which the authority is to be acted upon,

is to be taken to be according to the law of the particular country where it is acted upon.

In *ELF Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177, clause XIII of the relevant agreement had stated that 'this agreement shall be read and construed in accordance with the laws of Singapore'. The High Court of Malaya ruled that this did not oust the jurisdiction of the Malaysian courts to try an action arising out of the agreement and reference had been made to *The Fehmarn* [1957] 2 All ER 707, [1958] 1 All ER 333, where even when the agreement provided that disputes arising there should be tried in tribunals of a foreign country, the English courts held that that did not oust the English courts' jurisdiction to try the disputes.

It has been seen, in *Mackender v Feldia AG* [1967] 2 QB 590, that an English court would be most reluctant to permit service out of jurisdiction in the face of an agreement by the parties to submit the disputes to the exclusive jurisdiction of a foreign court. In the situation where the English court has undoubted jurisdiction over actions properly instituted in England, there is an inherent jurisdiction in the court to disregard an express foreign jurisdiction clause.

In the Malaysian case of *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160, pertaining to the issue of whether the case would be heard in Malaysia or in Singapore, the relevant passage from the decision of the High Court is as follows:

> As regards the forum non conveniens, which plea is more frequently stated than sustained, it is my view that this issue cannot be entertained as it is not really in dispute that the tort had been committed in Malaysia. This finding in effect overrides the other considerations, namely, that the two agreements were executed in Singapore, that there were specific clauses on governing law and jurisdiction in those agreements, that the transactions had been concluded outside Malaysia, whether there is a good arguable case, and the question of expenses, as either party would incur more expenses if the trial is held in the country of the other party. As for the witnesses, if they are from neither country, the cost of bringing them to either Singapore or Malaysia would be quite the same.
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> In the circumstances, it was my finding that there was no merit to this application and it was accordingly dismissed with costs.

The Federal Court held (according to the head note of the case at p 161) that:

> The Malaysian court was not precluded from exercising its discretion whether to hear the case merely because of the foreign jurisdiction clauses specifying the laws and courts of Singapore. However, those clauses militated against the respondents' argument that the Malaysian court was the most appropriate forum. Furthermore, all the respondents' securities were deposited with the appellant in Singapore and London and the main witnesses for the appellants were residents outside Malaysia. The respondents had, therefore, failed to satisfy the court that it was the most appropriate forum to try the action.

This ruling was, however, clarified by the subsequent decision of the Court of Appeal in *Inter Maritime Management Sdn Bhd v Kai Tai Timber Company Ltd Hong Kong* [1995] 1 MLJ 322.

A In *SNI Aerospatiale v Lee Kui Jak & Anor* [1987] 3 All ER 510, [1987] 2 MLJ 397, the Privy Council allowed the appeal by SNI Aerospatiale against the decision of the Court of Appeal of Brunei Darussalam ('Brunei') dismissing the appeal against the decision of the High Court declining to grant an injunction restraining the respondents from continuing proceedings B commenced by them in the 61st Judicial District Court of Harris County, Texas, in the United States of America.

The matter concerned a helicopter crash on 16 December 1980 near Kuala Belait in Brunei where all 12 people on board, including one Yong Joon San ('YJS'), were killed. YJS ran a very successful business providing catering services to oil rigs and other structures operating off Brunei and C he was at the same time making substantial sums on the New York Stock Exchange. At the time of his death, his fortune was estimated to be in the region of US20m. The helicopter was manufactured in France and owned by an English company and, being under contract to Sarawak Shell Bhd, was based at Miri Airport in Sarawak, Malaysia. Proceedings were started D by YJS's widow on her own behalf as widow, and by YJS's brother as administrator of YJS's estate. Three sets of proceedings were started in December 1981 in Brunei, France and Texas.

It was stated in the case ([1987] 2 MLJ 397 at pp 403–407), per Lord Goff of Chieveley, that:

E The law relating to injunctions restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction has a long history, stretching back at least as far as the early 19th century. From an early stage, certain basic principles emerged which are now beyond dispute. First, the jurisdiction is to be exercised when the 'ends of justice' require it (see *Bushby v Munday* (1821) 5 Madd 297 at p 307, per Sir John Leach VC; F *Carron Iron Co v MacLaren* (1855) 5 HL Cas 416 at p 453, per Lord St Leonards (in a dissenting speech, the force of which was however, recognised by Lord Brougham at p 459)). This fundamental principle has been reasserted in recent years, notably by Lord Scarman in *Castanho v Brown & Root (UK) Ltd & Anor* [1981] AC 557 and by Lord Diplock in *British Airways Board v Laker Airways Ltd* [1985] AC 58 at p 81. Secondly, where the court G decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed. As Sir John Leach VC said in *Bushby v Munday* at p 307:

> 'If a defendant who is ordered by this court to discontinue a proceeding which he has commenced against the plaintiff, in some other court of H justice, either in this country or abroad, thinks fit to disobey that order, and to prosecute such proceedings, this court does not pretend to any interference with the other courts; it acts upon the defendant by punishment for his contempt in his disobedience to the order of the court. ...'

I There are, of course, many other statements in the cases to the same effect. Thirdly, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court against whom an injunction will be an effective remedy: see eg *Re North Carolina Estate Co* (1889) 5 TLR 328, per Chitty J. Fourthly, it has been emphasized on many occasions that, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution: see eg *Cohen v Rothfield* [1919]

1 KB 410 at p 413, per Scrutton LJ, and, in more recent times, *Castanho v Brown & Root (UK) Ltd & Anor* at p 573, per Lord Scarman. All of this is, their Lordships think, uncontroversial; but it has to be recognized that it does not provide very much guidance to judges at first instance who have to decide whether or not to exercise the jurisdiction in any particular case.

The decided cases, stretching back over a hundred years and more, provide however a useful source of experience from which guidance may be drawn ... . Another important category of cases in which injunctions may be granted is where the plaintiff has commenced proceedings against the defendant in respect of the same subject matter both in this country and overseas, and the defendant has asked the English court to compel the plaintiff to elect in which country he shall alone proceed. In such cases, there is authority that the court will only restrain the plaintiff from pursuing the foreign proceedings if the pursuit of such proceedings is regarded as vexatious or oppressive: see *McHenry v Lewis* (1882) 22 Ch D 397 and *Peruvian Guano Co v Bockwoldt* (1882) 23 Ch D 225. Since in these cases the court has been presented with a choice whether to restrain the foreign proceedings or to stay the English proceedings, we find them the germ of the idea that the same test (ie whether the relevant proceedings are vexatious or oppressive) is applicable in both classes of cases, an idea which was to bear fruit in the statement of principle by Scott LJ in *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382 in relation to staying proceedings in this country, a statement of principle now overlaid by the adoption in such cases of the Scottish principle of forum non conveniens, which has been gratefully incorporated into English law.

The old principle that an injunction may be granted to restrain the pursuit of foreign proceedings on the grounds of vexation or oppression, though it should not be regarded as the only ground on which the jurisdiction may be exercised, is of such importance, and of such apparent relevance in the present case, that it is desirable to examine it in a little detail. As with the basic principle of justice underlying the whole of this jurisdiction, it has been emphasized that the notions of vexation and oppression should not be restricted by definition. As Bowen LJ said in *McHenry v Lewis* (1882) 22 Ch D 397 at pp 407–408:

> 'I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case ...'.

... Indeed, it has been stressed that there is no presumption that a multiplicity of proceedings is vexatious (see eg *McHenry v Lewis* at p 400 per Jessel MR) and that proceedings are not to be regarded as vexatious merely because they are brought in an inconvenient place (see *Hyman v Helm* (1883) 24 Ch D 531 at p 537, per Brett MR). But their Lordships, bearing in mind the words of caution expressed by Bowen LJ in *McHenry v Lewis* at pp 407–408 quoted above, think it wise to remember the breadth of the jurisdiction. In particular, the possibility must be borne in mind that foreign proceedings may be restrained not only where they are vexatious, in the sense of being frivolous or useless, but also where they are oppressive; and also that, as

A Bowen LJ observed, everything depends on the circumstances of the particular case, and new circumstances have emerged which were not, perhaps, foreseen by our Victorian predecessors. Their Lordships refer, in particular, to the fact that litigants may now be encouraged to proceed in foreign jurisdictions, having no connection with the subject matter of the dispute, which exercise an exceptionally broad jurisdiction and which offer such great inducements, B in particular greatly enhanced, even punitive, damages, that they may tempt litigants to pursue their remedies there ... .

Now it is to be observed, in the first place, that that approach has been overtaken by events in the form of the decision of the House of Lords in *The Spiliada* [1986] 3 All ER 843. If Lord Scarman's approach were to be adapted to take account of the statement of principle expressed in *The* C *Spiliada* as applicable in cases of stay of proceedings, it would presumably read as follows: 'To justify the grant of an injunction the defendant must show (a) that the English court is the natural forum for the trial of the action to whose jurisdiction the parties are amenable; and (b) that justice does not require that the action should nevertheless be allowed to proceed in the foreign court ...' .

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In the opinion of their Lordships, in a case such as the present, where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This E presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action; and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the court will not grant an injunction if, by doing F so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. Fortunately, however, as the present case shows, that problem can often be overcome by appropriate undertakings given by the defendant, or by granting an injunction on appropriate terms; just as, in cases of stay of proceedings, the parallel problem of advantages to the plaintiff in the domestic forum which is, prima facie, inappropriate, can likewise often be solved by granting a stay on terms ... .

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Now, if a question (which their Lordships accept could only be hypothetical) had arisen shortly after the commencement of proceedings by the plaintiffs in Brunei, whether those proceedings should be stayed on the ground that there existed another forum, ie Texas, which was clearly more appropriate for the trial of the action, there can be no doubt that such a H question would have been answered unhesitatingly in the negative. Obviously, there were strong connecting factors with Brunei as a forum. The fatal accident had happened there. In a sense that was fortuitous; but it carried with it the consequence that the applicable law governing the claim was the law of Brunei ... . In addition, the deceased was resident in Brunei and carried on his principal business there; and the plaintiffs, his widow and her I co-administrator, are likewise resident in Brunei. Again, having regard to the very substantial income of the deceased, and the volatile nature of the oil industry on which his business depended, it is plain that witnesses of fact, experienced in the conditions of that industry in Brunei, are likely to be called on the issue of quantum. As against these factors, there was absolutely nothing to connect the action with Texas at all.

Yet the Court of Appeal, like Mr Commissioner Rhind, concluded that, by the time the matter came before it, Texas had become the natural forum for the trial of the action. In order to test that proposition it is necessary to examine what had happened to bring about, in their opinion, that change.

In *MacShannon v Rockware Glass Ltd* [1978] 2 WLR 362, four Scotsmen, living and working in Scotland, sustained injuries in industrial accidents in Scotland. All the defendants were English companies having their registered offices in England. Each plaintiff, advised by experienced English solicitors to his trade union or his professional association that his action for damages for alleged negligence and breaches of statutory duty would best be brought in England, served proceedings on the defendants' registered offices in England. The defendant companies applied to stay the actions in England, leaving the plaintiffs to bring their claims in Scotland, the natural forum. They claimed that in each case, the disadvantage to the defendants of having to contest the claims in England was so great as to be oppressive and that the plaintiffs had failed to show any reasonable justification for choosing to litigate in England. It was held that the conditions necessary to justify a stay were that the defendant must satisfy the court that there was another forum to whose jurisdiction he was amenable, in which justice could be done at substantially less inconvenience and expense and that the stay would not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him in England, and it was not necessary that the continuance of the action should be oppressive or vexatious. It was also held that the defendants having shown that the only natural and appropriate forum for the actions was Scotland, where they could be tried at substantially less inconvenience and expense, and the plaintiffs not having discharged the consequent onus placed on them of showing that in Scotland they would be deprived of some real, personal or juridical advantage, the action should be stayed.

In *Kai Tai Timber Company Ltd Hong Kong v Inter Maritime Management Sdn Bhd* [1994] 4 CLJ 844, the defendant's vessel, Interhill King, had on 16 August 1993 carried the plaintiff's cargo of 6,378 pieces of freshly cut Malaysian hardwood round logs from Kuala Mukah in Sarawak, East Malaysia to Hong Kong. Unfortunately for both parties, the ship had capsized some time between 20 and 21 August 1993 and in consequence, the cargo was lost while in transit. Learned counsel for the defendant had referred to clause 3 of the bill of lading which states:

3 (Governing Law and Jurisdiction) The contract evidenced by or contained in this bill of lading shall be governed by Japanese law except as may be otherwise herein, and any action thereunder shall be brought before the Tokyo district court in Japan.

Counsel had reiterated that the applicable law is Japanese law and that the proper venue would be the Tokyo District Court in Japan. He had also made mention of clause 2 which stipulates:

2 (Clause Paramount) This bill of lading shall have effect, subject to the provisions of the International Carriage of Goods by Sea Act 1957 of Japan, unless it is adjudged that any other statute of a nature similar to

A the International Convention for the Unification of Certain Rules relating to bills of lading signed at Brussels on 25 August 1924 compulsorily applies to this bill of lading, in which case it shall have effect subject to the provisions of such statute and the said Act or statute shall to be incorporate herein ...

B He added that in these circumstances, the express choice governs, subject to certain limitations. Only if there was no express choice, he added, would the court examine the inferred choice of the proper law. Otherwise, he said, the court should objectively determine and apply the system of law with which the transaction has the closest and most real connection.

C The court held at pp 847–848:

The authorities cited lean towards the grant of an order for a stay of proceedings where there is a breach of an exclusive foreign jurisdiction clause but qualifies the position by stating that it is essentially a matter of discretion if the facts and circumstances are so strong as to amount to a good reason for the court to hold otherwise.

D On the facts of this case, although there is an exclusive foreign jurisdiction clause for the dispute to be heard in Japan, it is not disputed that the defendant is resident in Malaysia and the vessel is registered here. It is also conceded that the cargo was loaded in East Malaysia and the vessel was enroute to Hong Kong. Evidencewise, it would be cheaper to transport the Filipino crew members here than to Japan. All other relevant documentary E evidence was also readily available here. The plaintiff could also have some difficulty in enforcing a judgment obtained in Japan. Further, there is also some confusion as to whether the Hague Rules or the Hague-Visby Rules apply in Japan to determine the limit of liability.

On these considerations, it was my view that the matter could and F would be more appropriately dealt with here than in Japan. Accordingly, I had dismissed the defendant's application with costs.

On appeal, the Court of Appeal in *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong* [1995] 1 MLJ 322 at pp 322–323 held that:

G (1) ...

(2) The relative merits of having a trial either in this country or in the agreed foreign tribunal as well as the competing considerations that have to be weighed when deciding whether to give effect to a forum selection clause are matters pre-eminently within the province of the trial judge. An appeal should be rare and the court will be slow to H interfere with the judge's discretion.

(3) The judge committed no error in the way in which he stated the law. He was conscious of the burden on the respondent to produce strong grounds to displace the forum that had been selected and had asked himself all the right questions. Therefore, this was not a case for appellate interference.

I (4) The court refused to follow the American approach to forum selection clauses due to the juridical impossibility of incorporating it into our common law. In America, a judge has no discretion when faced with a forum selection clause and may only refuse a stay on grounds sufficient

to avoid a contract. Furthermore, circumstances sufficient to avoid a contract under American law may be inadequate to vitiate a contract under our *lex fori* because the contents of vitiating elements, such as fraud and undue influence, differ between Malaysia and the United States.

(5) In an application for a stay of proceedings based on forum non conveniens, the defendant must show that a forum elsewhere is more convenient to adjudicate the dispute and demonstrate why the suit should not proceed in the place where it was commenced. However, where there is a forum selection clause and the plaintiff brings an action in breach of the agreement, the burden is on the plaintiff to show why the agreement should not be honoured. The court is not bound to give effect to such an agreement since consent cannot create or confer jurisdiction upon a court that has none and it also cannot oust the jurisdiction of a court. In any event, the matters that are relevant to the exercise of discretion in both cases are almost identical.

The relevant passages at pp 331–332 and 334 state:

> The relevant law on the subject has, I believe, been settled by the decision of the Federal Court in *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Bhd* [1976] 2 MLJ 154 where Gill CJ (Malaya), said [at p 155]:
>
> 'As regards the general principles in relation to jurisdiction where parties have agreed to submit exclusively to a foreign jurisdiction, in the case of *The Fehmarn* [1957] 2 All ER 707, Wilmer J, said at p 710:
>
> " Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that that agreement should be over-ridden and that the proceedings in this country should be allowed to continue. However, in the end it is, and must necessarily be, a matter for the discretion of the court, having regard to all the circumstances of the particular case"'.
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> When it went up to the Court of Appeal [1958] 1 All ER 333 at p 335, [1958] 1 WLR 159 at p 161, Lord Denning said:
>
> 'The next question is whether the action ought to be stayed because of the provision in the bill of lading that all disputes are to be judged by the Russian courts. I do not regard this provision as equal to an arbitration clause, but I do say that the English courts are in charge of their own proceedings, and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. Such a stipulation is a matter to which the courts of this country will pay much regard and to which they will normally give effect, *but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them'*.(Emphasis added.)
>
> In a later part of his judgment ([1976] 2 MLJ 154 at p 155), the learned Chief Justice of Malaya reproduced the following passage from the judgment of Brandon J, as he then was, in *The Eleftheria* [1970] 94 at p 99, [1969] 2 All ER 641 at p 645:
>
> 'The principles established by the authorities can, I think, be summarized as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether

A to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded: (a) in B what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) with what country either party is connected, and how closely; (d) whether the defendants genuinely C desire trial in the foreign country, or are only seeking procedural advantages; (e) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a timebar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial'.

D Gill CJ then concluded his view in the following words [at p 156]:

> 'It would seem abundantly clear from the authorities that where a cause of action in respect of any dispute in relation to a contract arises and is therefore properly within its jurisdiction, the court has a discretion whether or not to adjudicate upon the claim in the action even where E the parties have agreed to refer such dispute to a foreign court, and that the question of jurisdiction is quite separate from the question of the proper law of the contract to be applied ...' .

To summarize, the relative merits of having a trial either in this country or in the agreed foreign tribunal as well as the competing considerations that have to be weighed in the balance when deciding whether to give effect to F a forum selection clause or to ignore it are matters pre-eminently within the province of the trial judge. Usually in this type of case, evidence is almost always given on affidavit with hardly any question of credibility arising. Since each case depends on its own facts, little or no assistance is to be derived from a copious citation of other decided cases. The judge should be allowed to read, in the quiet of his chambers, the evidence filed in the case G and the argument that is addressed to him should be crisp and brief. An appeal should be rare and this court will be slow to interfere with the discretion exercised by the judge unless, of course, it can be demonstrated to a conviction that the case is one that falls within the category of cases in which appellate interference is called for.

H On the question of multiplicity of proceedings, *Cheshire and North's Private International Law* (12th Ed) at pp 231 and 232 states:

> If litigation involving the same parties and the same issues is continuing simultaneously in two different countries, this is referred to as a case of lis alibi pendens. In such cases the issue facing the English court is not simply that of deciding to which of the alternative forum the plaintiff should have I to go to bring his action. Instead, the choice is between, on the one hand, trial in England plus trial abroad (if a stay is refused) and, on the other hand, trial abroad (if a stay is granted). It is very undesirable to have concurrent actions in England and abroad: this involves more expense and inconvenience to the parties than if the trials were held in merely one

country; it can also lead to two conflicting judgments, with an unseemly race by the parties to be the first to obtain a judgment and to subsequent problems of estoppel. The objection to concurrent proceedings is said to be even stronger if this involves in one of the two states, proceedings for a negative declaration (a declaration that a person is not liable in an existing action).

In fact, the first defendant had not stated the purpose nor furnished the reason as to why they had filed the matter in the United Kingdom in the first place. Hence, taking into account the witnesses' convenience and time, travel and hotel expenses, and legal costs of the case if the matter was heard in the United Kingdom and not in Malaysia, considering that the dispute involves the same transactions and an identical set of facts and witnesses, this court holds that there cannot be two sets of judicial proceedings in different jurisdictions on the same subject matter between the same parties as this would give rise to multiplicity of proceedings and possible conflicting judgments. With these in mind and knowing that the notion of vexation and oppression should not and cannot be restricted by definition as they vary from case to case, it can be said that it would be vexatious and oppressive to proceed in the United Kingdom courts if all the factors are considered in its totality.

The only problem that may arise is the difficulty of enforcing the judgment against the second plaintiff in the Cayman Islands as there is no reciprocal enforcement of judgment treaty between Malaysia and the Cayman Islands although there is one between the United Kingdom and the Cayman Islands. However, learned counsel for the plaintiffs had proposed that the first plaintiff give an undertaking to honour any final judgment given by the High Court of Malaya after final appeals to the Court of Appeal and the Federal Court in the KL action as it owns 100% of the second plaintiff provided a similar undertaking is given by the first defendant for any successful counterclaim by the plaintiffs.

Having considered the affidavits, arguments and authorities, this court holds that the natural and appropriate forum is the Malaysian courts and grants the order in terms of the first three prayers of the plaintiffs' application subject to the undertaking on the reciprocal enforcement of judgment as referred to above to be finalized within two weeks' of this order, with further liberty to apply. As for the fourth prayer of the plaintiffs' application, this court holds that each party is to bear their own costs.

After hearing further submissions on the point, the court ordered that the question of costs in the UK suit as regards the interlocutory application is to be argued in the London court on 16 May 1995 and that the costs in the UK suit up to the interlocutory application are to be incorporated as costs in the cause in the KL action.

Application allowed.

Reported by Ng Sheau Jiuan